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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-59

ROBIN PRAETZ, PETER PRAETZ and ALLEN CHARLES, M.D.,

Petitioners,

vs.

PAUL Q. PETERSON, M.D., Director, Department of Public Health, State of Illinois, and MURRAY C. BROWN, M.D., Commissioner, Department of Health, City of Chicago,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CHICAGO COMMISSIONER OF HEALTH

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OPINIONS BELOW

The opinion of the District Court for the Northern District of Illinois, Eastern Division, is unreported, but is reproduced in Appendix B of the petition for certiorari (pp. 23-30).

The opinion of the Court of Appeals for the Seventh Circuit is also unreported, but is reproduced in Appendix A of the petition for certiorari (pp. 16-22).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition for certiorari.

QUESTIONS PRESENTED

(1) Whether the State, in the exercise of its police power to protect the public health, and a municipality, under its delegated police power, may enact and enforce regulations excluding non-medical persons, including spouses, from the operating rooms of hospitals, during surgery.

(2) Whether the liberty secured by the Constitution of the United States to every person within its jurisdiction imports an absolute right in each person, in the exercise of his or her family relationships, to be wholly freed from the obligation to conform to general health regulations.

STATEMENT OF THE CASE

The statement of the case set forth on pages 5 through 10 of the petition for certiorari is correct. However it does not indicate the position of the Chicago Department of Health in this controversy. That is set forth in footnote 2 of the opinion of the court of appeals, reproduced in Appendix A on pages 18 through 20 of the petition for certiorari. This states:

> *2 Counsel for defendant, Commissioner of the Chicago Department of Health, informed the court at oral argument that the Commissioner was reexamining his interpretation of the state regulation governing access to hospital operating rooms during surgery. The Commissioner, in supplemental briefs, sets forth eleven requirements which must be met before a father is not a "lay visitor" within the meaning of the state regulation. We initially question the power of the Commissioner as opposed to the Illinois Attorney General, to authoritatively interpret state regulation. See *Ill. Rev. Stat.* Ch. 14 § 4 . . . The conditions imposed are:
>
> 1. Both parents have attended preparatory childbirth classes approved by the Board of Health, prior to the delivery.
> 2. Hospital procedures permit presence of the father during Cesarean Section.
> 3. The obstetrician has submitted the request of both the mother and father in writing to the chairman of the Department of Obstetrics and Gynecology at least one week prior to the scheduled Cesarean Section.
> 4. At the time of the section, the obstetrician, anesthesiologist and nursing supervisor for such procedure all concur in admitting the father.
> 5. The hospital, prior to the section, informs both parents that unforeseen contingencies may preclude the father's presence at any time before, during, or after the procedure. He may at any time be directed to leave the room by the obstetrician, anesthesiologist or the nurse.
> 6. The father may be allowed in the delivery room only if the surgery is to be performed under regional anesthesia and not under general anesthesia.

7. The father must be escorted to the operating room by a member of the nursing staff.
8. The father is allowed only after the anesthesia has been induced and the patient has been prepped and draped.
9. The father must be surgically gowned and masked and may sit only at the head of the table, to the side of the anesthesiologist; he may not stand up to watch the procedure.
10. If maternal sedation is indicated after birth, the father will be directed to leave the operating room.
11. Once the procedure is completed the father must leave the operating room and may not be allowed to enter the recovery room.

REASONS FOR DENYING THE WRIT

This is an interesting case and the petition for certiorari (p. 11) is certainly correct in asserting that it would afford "this Court the opportunity of further defining the boundaries of the right of familial privacy." However, the decisions of both the district court and the court of appeals in this case are so clearly correct that it cannot be claimed that the case raises any novel question of federal law. Nor is the petition able to point to any conflict between circuits that might qualify as a valid reason for the grant of a writ of certiorari.

The result below is not in conflict with any decision of this Court. Invocation by the petitioners of *Griswold v. Connecticut*, 381 U.S. 484 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973), "will not", in Justice Holmes' phrase, "wash." The distinction between them and the present matter was accurately drawn in *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716 (7 Cir. 1975), cert. den. 425 U.S. 916 (1976). There Mr. Justice Stevens, then a circuit judge, concluded:

> "The birth of a child is an event of unequalled importance in the lives of most married couples. But deciding the question whether the child shall be born is a different magnitude from deciding where, by whom, and by what method he or she may be delivered. In its medical aspects, the obstetrical procedure is comparable to other serious hospital procedures. We are not persuaded that the married partners' special interest in their child gives them any greater right to determine the procedure to be followed at birth than that possessed by any other individuals in need of extraordinary medical assistance."

The authority of the State and the delegated authority of the City to enact and enforce, under the police power, health and safety laws and regulations are fundamental. As long ago as 1905 this Court in *Jacobson v. Massachusetts*, 197 U.S. 11, so held in rejecting the contention that compulsory vaccination derogates from the liberty guaranteed by the Fourteenth Amendment. The first Justice Harlan, writing for the Court, declared:

> "The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination, that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every free man to care for his own body and health in such a way as to him seems best.
> 1 . . .
> "It seems to the Court that an affirmative answer to these questions would practically strip the legislative department of its function to care for the public health and public safety . . ."

Michael Reese Hospital is not a party to this lawsuit and petitioners do not appear to be authorized to speak for that or any other hospital. But accepting as accurate the representation in their petition that the governing physicians at Michael Reese are of the opinion that the father can be permitted to be present during a cesarean section delivery provided very detailed precautions are taken (R. 7, App. 1), that amounts at most to no more than an assertion that there are different schools of medical opinion on the subject, and the dominant medical opinion at Michael Reese is not in agreement with the medical opinion of the State and City health authorities.

The federal courts do not sit as super-legislatures to weigh the wisdom of legislation or administrative

regulations. The Due Process Clause does not authorize the federal courts to invalidate health and safety regulations because they are out of harmony with a particular school of thought. *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

Health regulations are of general application. Michael Reese is one of the largest and best equipped hospitals in Chicago; it may be able safely to permit fathers to be present in its operating rooms during cesarean deliveries. But there are many hospitals in the state—large and small—good, bad and indifferent. Many of these hospitals may not be able to cope with the presence of laymen at surgical operations. The facilities in some hospitals may be such that lay persons could not be present without interfering with the privacy of other patients. Their presence might increase the possibility of contamination. Their emotional outbursts might disrupt the performance of the operation. The health authorities of the State and City are no doubt much more familiar with hospital conditions in general than the plaintiffs or even the governing physicians at Michael Reese; it is their duty to be cognizant of what is generally feasible and they act in furtherance of a most compelling state interest—the public health.

If the State and City health authorities are mistaken, the remedy is to persuade them of that through medical channels. Certainly Michael Reese is an influential institution and can make its views heard, if it chooses. But courts do not have the competence to determine which medical opinion is correct.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 2, 1978